IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL REVISION No. 290 of 2004

LRS OF CHANDIDAN & ANR
V/S
BISHANDAS

Mr. PK BHANSALI, for the appellant / petitioner

Mr. MR SINGHVI, for the respondent

Date of Order : 21.3.2005

HON'BLE N P GUPTA,J.

ORDER

Heard learned counsel for the parties.

The plaintiff-petitioner by this revision seeks to challenge the order of the learned trial Court dated 24.11.2003, accepting the defendant's application, filed under Order 9 Rule 13 CPC.

The relevant facts are, that the plaintiff filed a suit for eviction against the defendant on 26.3.1997, (this date was informed to the Court by learned counsel for the defendant, and the learned counsel for the petitioner informed, that he is not in a position to inform the date. However, I find on record, the certified photostat copy of the plaint, which bears the endorsement of the presentation to be dated 26.3.1997), wherein an exparte decree was passed on 11.8.97, and an application was filed under Order 9 Rule 13 for setting the same aside, on 22.5.98. The application was contested, and the learned trial Court recorded the evidence of the parties, wherein 4 witnesses were examined on the side of the defendant, while the process-server, Mohan Lal was examined on the side of the plaintiff, and the learned trial Court, by the impugned order has allowed the same.

Assailing the impugned order, it is contended by the learned counsel for the petitioner, that in this case, there is interpolation in the summons, in its report about service, inasmuch as, the name mentioned in the report as विशनदास has been interpolated as किशनदास, and that a specific note recorded by the clerk, to the effect, that he has

not done it, and it is not known, as to who had done it.

The second submission made is, that the burden lay on the defendant to prove that the summons were not served on him, and to discharge that burden, the defendant विशनदास has not appeared in the witness-box, rather A.W.1, Pawan Kumar has appeared as his power of attorney holder, while in view of the judgment of Hon'ble the Supreme Court, in Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors., reported in 2005 (123) Company Cases 155, the power of attorney is not entitled to step in the witness-box as the principal, and at best, can only depose the facts which are within his knowledge, and thus, the defendant has failed to discharge the burden, which lay upon him. On the other hand, the plaintiff has examined the process-server, D.W.1 Mohan Lal, who has clearly testified the report of the service, and therefore, it is clearly proved that the service was affected, on the defendant in accordance with law.

The next submission made is, that during pendency of the proceedings under Order 9 Rule 13, the plaintiff Chandidan had expired, and though application was filed for bringing on record his legal representatives, but then, no judicial order has been passed by the learned Court below, taking those legal representatives on record, and thus, the impugned order has been passed against a dead person. Though in the order, the names of the legal representatives have been mentioned. Thus, the order is bad.

On the other hand, learned counsel for the defendant submitted, that A.W.1, who has appeared as power of attorney, is none-else the son of the defendant, and has deposed the facts, which are within his personal knowledge. An alternative submission was also made, that even the learned trial Court has taken into account, only those facts, from out of the statement of A.W.1, which are deposed to his personal knowledge, and therefore, mere non-appearance of defendant

विशनदास in witness-box is of no material adverse consequence, more particularly in view of the fact that the precise case of the defendant is, that at the relevant time, विशनदास was not in Mount Abu, but was in Delhi, and was undertaking treatment. It was submitted, that apart from A.W.1, even from the evidence of A.W.3, Harendra Puri, and A.W.4 Dr. Gopal Krishan, the story propounded by the defendant is clearly proved. Reading the statement of D.W.1, Mohan Lal, the process-server, it was submitted, that he is a rank lier, in his statement, at every step he has resorted to false stories, and has taken shifting stands. Thus, it was contended, that the summons were never served on the defendant, and the order passed by the learned trial Court is justified.

I have considered the submissions. I may observe that I was taken through the record at length, to the extent as if I was the trial Court, even forgetting the bounds, that this is a revision petition under Section 115 CPC, and jurisdiction where-under is very very limited. Be that as it may.

Even after going through the record, and the statements of all the witnesses, and documents in detail, I am at one with the findings recorded by the learned trial Court in paras 11, 12 and 15 about the service said to have been effected on the defendant. For the sake of brevity, I need not repeat the relevant excerpts of the evidence, reproduced by the learned trial Court. In addition, what is significant to note is, that the plaintiff appears to have played very smart, inasmuch as, the suit was instituted on 26.3.97 for eviction from the landed property, fixing the date for written-statement on 29.3.97, and on 26.3.97 itself, the office made its report, the suit was registered, and summons were ordered to be issued, and actually issued, and on 27.3.97 they were got purportedly served by affixture. It is no less significant to note, that the defendant has produced and proved on record the documents to show, that the plaintiff very well had the knowledge about the defendant living at Delhi, and the detailed

address of the defendant, inasmuch as, after the earlier landlord's declining to receive rent from defendant, the defendant had sent the rent to the plaintiff, and had addressed correspondence also, by registered AD Post, and those AD cards have been produced on record, which clearly show, that they mention the address of the defendant to be resident of I-91 Ashok Vihar, Delhi 51. Thus, it is more than clear, that the plaintiff was very much aware about the defendant's residence to be at Delhi, obviously the plaintiff was supposed to have disclosed the other address of the defendant also, which was within his knowledge, and should have made a sincere, and bonafide, attempt to see that the defendant is served. As against which, it clearly appears, that the plaintiff has rather attempted to abuse the process of the Court. It is clear from perusal of Ex.6, the summons, that it does not bear any outward number, or date of its dispatch from the Court, and/or receipt by the Nazir, and in turn endorsed to the process server. Likewise, the process-server himself had deposed, that he returned the summons to the Nazir on 29.3.97, which was the date fixed for hearing of the case. I am yet to come across the Jet speed functioning of the Court of Civil Judge (Sr. Div.), Mount Abu, at which he has purported to function in the present case, in registering the suit on the same day it was presented, and ordered the summons to be issued, and actually issued the summons, so also fixing the date for service just within three days.

So far alleged interpolation of the summons is concerned, nothing has been pleaded in the reply to the application under Order 9 Rule 13, nor any argument was made before the learned trial Court in this regard, and even during submissions made before me by the learned counsel, learned counsel has not been able to clarify, as to what logical conclusion he wants to draw, against the impugned order by making the submission, therefor this contention need not detain me.

Then taking up the submission about the order having been

passed against the dead person, on account of want of judicial order of the learned court below, taking the Legal Representatives on record, suffice it to observe that application for substitution of L.Rs. was filed by the defendant, whereupon vide order dated 2.9.2002 notices of the application were ordered to be issued to the other L.Rs. as the non-petitioner no. 2 was the L.R. no. 6, fixing the case on 30.9.2002, but then since they could not be served, on 28.7.2003 the notices were ordered to be served by publication in news paper, which were duly published, but on the date fixed, being 25.8.2003 nobody appeared on their behalf. Then on the next date being 10.9.2003 the amended cause title was taken on record. True it is that the learned trial court should have passed the formal order of taking the L.Rs. on record, but then I find on record that, before death the evidence of the defendant had been recorded, and after taking of the amended cause title on record, on the next date, being 17.9.2003, the counsel for Bal Kanwar, one of the legal representative, which was already on record, sought time for producing evidence, then the process was got issued to summon the witness Mohan Lal, and his statement was recorded on 8.10.2003. Then the case was argued, and the impugned order was passed. In this background I find on record at page B24/1 the Vakalatnama in favour of Amba Lal and Ishwar Lal Acharya etc. advocates, given by the L.Rs. of the deceased plaintiff Chandidan, and these are the advocates who were the counsels for the plaintiff, in the original suit, so also were the counsel for them in these proceedings, since beginning, and they had never raised any objection in this regard before the learned court below. In that view of the matter when the learned Trial court vide order dated 10.9.2003 had taken the amended cause title on record, and there is Vakalatnama of the L.Rs., and they have actively participated in the proceedings with the consciousness of their having been taken on record, in my view, at best, it may be an irregularity, but then, on that basis it cannot be said, that the impugned order has been passed against a dead person, or is therefore void or bad. This contention is therefor rejected.

Going through the entire material on record, and considering all the aspects of the matter, including the findings recorded by the learned trial Court, concurring with all the reasons given by the learned trial Court, and for additional reasons, I do not find any jurisdictional error in the impugned order requiring interference by this Court in revision.

The revision petition is, therefore, dismissed summarily.

(N P GUPTA),J.

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